No. 98-591

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSONS, INC.,

Petitioner,

—v.—

HALLIE KIRKINGBURG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF JUSTICE FOR ALL; AARP; AIDS POLICY CENTER FOR CHILDREN, YOUTH & FAMILIES; ALLIANCE FOR REHABILITATION COUNSELING; AMERICAN ASSOCIATION ON MENTAL RETARDATION; AMERICAN MEDICAL STUDENT ASSOCIATION; ARC OF THE UNITED STATES; BRAIN INJURY ASSOCIATION, INC; CENTER FOR WOMEN POLICY STUDIES; COMMITTEE FOR CHILDREN; ET AL; AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

(Additional Amici continued on inside cover)

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INTEREST OF THE AMICI CURIAE[1]

This *amici curiae* brief is submitted on behalf of Justice for All; AARP, AIDS Policy Center for Children, Youth and Families; Alliance for Rehabilitation Counseling; American Association on Mental Retardation; American Medical Student Association; Arc of the United States; Brain Injury Association, Inc.; Center for Women Policy Studies; Committee For Children; Disabled in Action of Metropolitan New York; Employment Law Center; Epilepsy Foundation of America; Gay and Lesbian Advocates and Defenders; Lambda Legal Defense and Education Fund, Inc.; Legal Action Center; National Association of People With AIDS; National Association of Protection and Advocacy Systems; New York Lawyers for the Public Interest; Self Help for Hard of Hearing People; Title II Community AIDS National Network; and Union of American Hebrew Congregations. The statements of interest of *amici* are included in the appendix to this brief.

By written consent of the parties,[2] *amici curiae* submit this brief in support of Respondent Hallie Kirkingburg.

SUMMARY OF ARGUMENT

The issues in this case concern whether the ADA will serve Congress' intent as a viable tool for dismantling systemic discrimination in a society in which disability, rather than actual ability, is the frequent focus of determining employability. Congress intended that the ADA protect a

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[1] This brief has been authored in its entirety by undersigned counsel for the *amici*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] Letters of consent from all parties have been filed separately with the Clerk of the Court.

broadly-defined group of individuals with disabilities from discrimination, understanding as it did that it would have to battle attitudinal barriers as well as physical barriers which routinely confront and frustrate individuals with disabilities who wish to work.

Adoption of Petitioner Albertsons' analysis, that one can be too impaired to perform a job but not sufficiently impaired to merit ADA protection, would negate the statute's mandate against discrimination for the majority of individuals with disabilities who are able to work.

Moreover, nothing in the ADA dictates that in cases involving impairments which are objectively and predictably limiting of some major life activity, a plaintiff must nonetheless introduce individualized evidence of the impairment's impact on his or her particular major life activities. Inserting such a requirement into the Act in cases in which a reasonable person would expect that an individual's impairment would substantially limit major life activities would require both plaintiffs and defendants to engage in expensive fact-finding that is unnecessary for addressing the merits of the discrimination claim. In Kirkingburg's case, his monocular vision undisputedly and profoundly affects the manner and ease with which he sees and a host of major life activities related to seeing.

With § 12101(2)(C) of the ADA, Congress intended to protect people from a range of discriminatory conduct and reactions motivated by myths, fears and stereotypes about disabilities which are common even when a person does not have a substantially limiting impairment. This protection for persons "regarded as" disabled is necessary to address a major form of discrimination involving the classifying and labeling of individuals perceived as disabled, without regard to their real abilities to do what a job actually requires. Albertsons' characterization of physical requirements that are not

necessary for the hiring of safe and skilled drivers as "an essential job function" constitutes a paradigmatic example of conduct which violates the "regarded as" definition of disability.

ARGUMENT

I. CONGRESS DEFINED DISABILITY IN THE ADA TO ENSURE THAT INDIVIDUALS WHO ARE CAPABLE OF WORKING ARE NOT PRECLUDED FROM DOING SO BECAUSE OF DISCRIMINATION AGAINST THEM BASED ON A WIDE RANGE OF IMPAIRMENTS.

A. The History And Purpose Of The ADA's Definition Of Disability.

The term "disability" in the ADA means, "with respect to an individual":

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment;

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

This definition was not a new creation. As the Court recognized just last term, this definition derived from the definition of handicap added to the Rehabilitation Act in 1974, and the legislative and regulatory history of that amendment is relevant to the interpretation of the ADA. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998); 42 U.S.C. §

12201(a).[3] In amending the Rehabilitation Act, Congress discarded a narrow, technical definition directed towards individuals who needed rehabilitation services[4] in order to be employable in favor of a three-pronged definition of "handicapped individual" that applies to individuals who can work without the benefit of vocational services but nevertheless experience discrimination. *See* Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 706(8)(B) (1998)).

The first prong of the amended definition contains broad language flexible enough to reach a wide range of health problems (i.e., "physical or mental impairment which substantially limits . . . major life activities"). *See* 88 Stat. 1617, 1619 (1974). Congress included the second and third prongs to address discrimination arising from stereotypes and ignorance about physical and mental impairments. *Id. See also*, S. Rep. No. 1297, at 16, 37-38, 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388-91, 6413-6414.

In promulgating regulations under the Rehabilitation Act, the Department of Health and Human Services ("DHHS") found that a "broad" definition, one not limited to

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[3] *See also, e.g., Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) ("The ADA defines a disability in substantially the same terms as the [Rehabilitation] Act defines an individual with handicaps."); *McCullough v. Branch Banking & Trust Co.*, 35 F.3d 127, 131 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995) ("The federal policies behind the ADA and the Rehabilitation Act are similar.").

[4] The Rehabilitation Act of 1973 defined "handicapped individual" to mean: "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973).

"traditional handicaps," was inherent in the statutory definition. *See* 45 C.F.R. § 84, App. A, at 310 (1985). This court agreed in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 280 n.5, 283-284 (1987) (endorsing DHHS' commentary, and observing that this flexible definition of "handicap" was also intended to protect individuals who may not have any diminished physical capability, but who are substantially limited solely because of the negative attitudes of others towards their impairments). One year after the Court's decision in *Arline*, Congress used the identical, broad definition of "handicap" in the Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620 (1988), and endorsed the DHHS regulations.[5]

Congress enacted the ADA in 1990 to extend the prohibition against discrimination on the basis of disability to private employers and public accommodations.[6] In so doing, Congress adopted the Rehabilitation Act's definition of "handicap," and, as this Court noted recently, mandated that courts "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Bragdon*, 118 S. Ct. at 2202 (1998); 42 U.S.C. § 12201(a).[7]

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[5] *See* H.R. Rep. No. 100-711, 22, *reprinted at* 1988 U.S.C.C.A.N. 2173, 2183 (1988) (*citing* 45 C.F.R. § 84, App. A and noting that the committee intended that the definition of handicap be interpreted consistent with regulations clarifying the definition of handicap in the Rehabilitation Act).

[6] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 *et seq.* (1998)).

[7] By the time Congress passed the ADA, courts had provided protection against discrimination under the Rehabilitation Act and the Fair Housing Act to individuals with a wide variety of impairments. *See e.g., Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990), *cert. denied*, 499

The ADA provides a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (1994). Congress adopted the Rehabilitation Act's broad, three-pronged definition of "handicap" in order to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with impairments which are not so debilitating as to preclude working and the enjoyment of public accommodations. *See* 42 U.S.C. § 12101(a)(8).[8] As the First Circuit observed, the purpose of the ADA in the employment context is "essentially to protect individuals who have an underlying medical

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U.S. 904 (1991) (noting that "it is well established that infection with AIDS constitutes a handicap" under the Rehabilitation Act); *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720, 725-728 (S.D. Ill. 1989) (HIV-positive persons are covered under the Fair Housing Act); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (plaintiff with epilepsy is person with disability under § 504); *Fynes v. Weinberger*, 677 F. Supp. 315, 321 (E.D. Pa. 1985) (plaintiff with asbestosis is person with disability under § 504); *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (insulin-dependent diabetic is person with disability under § 504); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1376 (10th Cir. 1981) (plaintiff with multiple sclerosis is person with disability under § 504); *Gilbert v. Frank*, 949 F.2d 637 (2nd Cir. 1991) (individual with kidney disease requiring regular dialysis has a disability under the Rehabilitation Act); *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (person with seizure disorder); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989), *cert. denied*, 493 U.S. 892 (1989) (individual with asymptomatic hepatitis B).

[8] *See also* 42 U.S.C. § 12101(a)(2) (Congress found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem."); H.R. Rep. No. 485, pt. 2, 101st Cong., 2nd. Sess. at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (Individuals with disabilities have been subject to discrimination based on "and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society.").

condition or other limiting impairment, but who are in fact capable of doing the job." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998).

Congress understood that discrimination against such individuals impedes economic self-sufficiency and creates dependence on social welfare programs. *See* 42 U.S.C. § 12101(a)(9) ("[D]iscrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.").[9] Thus, to promote independence, the statutory text covers a wide range of congenital and acquired conditions which fall outside the general public's common understanding of the term "disability."

The ADA must be construed in light of its purpose as a nondiscrimination statute rather than a benefits entitlement statute.[10] Consistent with the structure and purpose of federal antidiscrimination statutes, prohibited classifications under the ADA should be construed broadly. In cases dealing with discrimination on the basis of race or gender, *see* Title VII, 42 U.S.C. § 2000e *et seq.*, for example, the critical issue is not whether the plaintiff is within the protected class by

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[9] *See also* S. Rep. No. 101-116, 116-117 ("The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency and social welfare programs that cost the taxpayers unnecessary billions of dollars each year.").

[10] In contrast to the broad definition of disability in the ADA, Congress defined the term disability in the Social Security Act as "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A).

employing a prohibited classification without a sufficient basis for doing so, but whether the defendant discriminated.

In an ADA Title I case, a plaintiff must prove, in addition to discrimination, that he or she is qualified for the job in question. Consequently, the fact that the class of protected individuals is broadly defined does not imply that the plaintiff can readily prevail. Rather, it simply means that the Act's nondiscrimination mandate should apply generally to those qualified individuals who can demonstrate discrimination due to the congenital or acquired health condition at issue.[11]

The goals of the ADA require that the group classified as "disabled" be broad and that the merit of claims then be determined by an assessment of whether the individual has been discriminated against within the meaning of the statute and is "qualified" for the job. As this Court noted in *Arline*, the fundamental premise of the Rehabilitation Act, upon which the ADA is based, is to replace "myths and fears" about impairments with "actions based on reasoned and medically sound judgments." *Arline*, 480 U.S. at 284-85. If courts apply an overly restrictive approach to defining who can meet the statute's definition of "disabled," employers and public accommodations would be able to act based on myths and stereotypes — the very problem that the ADA is intended to eradicate. *See* 42 U.S.C. § 12101(a)(7) (noting pernicious effects of "stereotypic assumptions" about individuals with disabilities). An overly restricted reading of the statute, such

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[11] The breadth of the definition of disability is balanced by additional limiting or restricting principles. For example, individuals with disabilities are entitled to a "reasonable accommodation" only when it does not impose an undue hardship, 42 U.S.C. § 12112(b)(5)(A), or fundamental alteration of services. 42 U.S.C. § 12182(b)(2)(A)(ii). Discrimination also is permitted if the disability creates a "direct threat to the health or safety of others." 42 U.S.C. §§ 12113(b) and 12182(b)(3).

as that suggested by Petitioner, also would produce the absurd result that individuals who are less than fully incapacitated by their serious impairments are unprotected from discrimination because they are not "disabled," while only those whose impairments are so incapacitating that they are not qualified for work are covered under the Act. In such a world, no one has a claim under the ADA and a statute designed to promote equal opportunity and independence is reduced to a meaningless platitude.

B. The Term "Substantially Limits" In The Definition Of Disability Must Be Interpreted To Apply To The Impairments Of Individuals Who Have Some Congenital Or Acquired Health-Based Limitation That Is Not Incapacitating.

Under the first prong of the definition of disability, a physical impairment constitutes a disability if it "substantially limits" a major life activity. 42 U.S.C. § 12102(2)(A). The phrase "substantially limits" must be construed in light of the ADA's purpose to eradicate discrimination against individuals with physical or mental impairments which are not so debilitating or incapacitating that the person is unable to work. Congress' choice of the words "substantially limits" plainly rejects any requirement that an individual be completely unable to engage in a particular life activity in order to be considered disabled. *See Bragdon*, 118 S. Ct. at 2206 (observing that the "substantially limits" test can be met even if the difficulties resulting from the limitation are not "insurmountable").

Petitioner misses the entire point of the ADA by arguing that Kirkingburg cannot be substantially limited in seeing because he can "otherwise perform normal daily activities requiring eyesight," and "has a long history of

employment." *See* Petitioner's Brief at 22-23.[12] The fundamental premise of the ADA is that there are individuals with disabilities (e.g., individuals who are substantially limited in major life activities, such as those related to seeing) who, in fact, are fully capable of performing the same activities, including work, as individuals without disabilities.

The statute does not define the term "substantially limits." Importantly, however, the statutory language does not require that the impairment limit the major life activity in any particular way. The Equal Employment Opportunity Commission's (EEOC) regulations[13] reflect this and the conclusion that it is *how* an individual accomplishes a task or activity, rather than *whether* the individual can accomplish the activity, that determines a substantial limitation. The regulations provide that:

> The term substantially limits means:
>
> . . .
>
> (ii) Significantly restricted as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, *manner* or duration under which the average person in the general population can perform that same major life activity.

[12] Petitioner Albertsons asserts that "Kirkingburg's long and consistent job history demonstrates he is not substantially limited in the major life activity of seeing." Petitioner's Brief at 15. This brand of analysis would force the conclusion that Helen Keller was not disabled or entitled to the protection of disability nondiscrimination laws.

[13] Congress authorized the EEOC to issue regulations to implement I of the ADA. *See* 42 U.S.C. § 12116.

29 C.F.R. § 1630.2(j)(1) (emphasis added).[14] These regulations are entitled to deference. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (if statute is silent or ambiguous, deference due if agency's construction is "permissible" or "reasonable" reading, and does not conflict with clearly expressed Congressional intent). *See also Bragdon*, 118 S. Ct. at 2209 (granting *Chevron* deference to views of agency directed by Congress to issue implementing regulations, technical assistance and to enforce ADA).

A significant restriction in the "manner" of performing a major life activity concerns the mode or difficulty of performing the activity, not whether the individual can achieve an equivalent result as an individual without that impairment. Consistent with the statute's language and purpose, the regulation requires a common sense determination of the relative significance of an impairment, not a finding of significant incapacitation or functional limitation.[15] For example, a person who has had a laryngectomy and speaks with a voice box still performs the major life activity of speaking. Such a person may perform

[14] These regulations are consistent with the ADA's legislative history. *See* S. Rep. No. 116, 101st Cong., 1st Sess. at 23; H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. at 52 ("A person is considered an individual with a disability for purposes of the first prong of the definition when an individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people.").

[15] This Court in *Arline* recognized that the "substantial limitation" requirement was not intended to be overly exacting. The *Arline* Court quickly and easily determined that the plaintiff was substantially limited in a major life activity simply because she had been hospitalized on one occasion, without need for any further inquiry. *See* 480 U.S. at 281.

"normal daily activities requiring [speech]" and may have a "long history of holding employment positions requiring the use of [speech]." *See* Petitioner's Brief at 22-23. An individual with a voice box, however, is significantly restricted in the manner in which he or she can speak as compared to a person in the general population, as well as in a host of other activities that involve speech, such as interacting with others. Similarly, a person with prosthetic limbs may walk and run, but does so with significantly greater difficulty than a person who does not rely on prostheses. Clearly, the fact that a person who has lost limbs can walk and run does not alter that she is significantly restricted in these and other major life activities. Most importantly, her ability to run does not render an employer's disinclination to hire her any less discriminatory.

The U.S. Civil Rights Commission illustrated this "spectrum of abilities" principle through an examination of the function of sight:

> The simplistic categorization of "blind" and "sighted" . . . actually covers infinite gradations and variations of the ability to see. Vision is not one-dimensional, but rather involves a number of component functions, such as seeing at a distance, distinguishing colors, focusing on nearby objects, seeing in bright light, seeing in shade or darkness, seeing to the side and so on. For each such visual function there is a range of abilities. For example, at one end of the visual acuity spectrum are the few people with unusually sharp eyesight — those who can read finer print than that on the bottom of a doctor's eye chart. At the other end are the tiny proportion with no vision whatsoever. The vast majority of people fall somewhere between these two extremes. A similar continuum occurs in other component functions of the ability to see. . . . This simple concept's relevance to discrimination lies in the frequency with which it is ignored. Instead of discerning the range of individual abilities, society categorizes people as either blind or sighted . . . either handicapped or normal.

Robert L. Burgdorf, Jr., *"Substantially Limited" Protection From Disability: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 519-522 (1997) (hereinafter "Burgdorf, *'Substantially Limited' Protection*") (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983)).

The Ninth Circuit correctly found that Kirkingburg has an impairment that limits his peripheral vision and depth perception and is significantly restricted in the manner in which he sees as compared to most people. *See Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1231 (1998). *See also* Respondent Kirkingburg's Brief, Argument § I.A.(3) (describing the permanent and uncorrectable limitations and restrictions in the manner of seeing and the lowered visual acuity in every person with amblyopia).[16] Under controlling regulations, Kirkingburg's amblyopia constitutes a substantial limitation of the major life activities related to seeing.

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[16] Clearly, affirming the Ninth Circuit's decision in this case would not mean that every person who wears eye glasses has a disability under the ADA by virtue of that fact alone.

II. THE TEXT AND PURPOSE OF THE ADA DEMONSTRATE THAT CERTAIN IMPAIRMENTS INVARIABLY MEET THE STATUTORY DEFINITION OF DISABILITY.

The petitioner's first question presented raises the threshold issue of whether some impairments are "per se" disabilities. The Ninth Circuit never addressed the issue and no ruling on this question is necessary to affirm the Ninth Circuit's opinion.

Moreover, the phrase "per se disability" is something of a misnomer. The words "per se" imply that some impairments are simply deemed to be disabilities without regard to the ADA's definition. To the contrary, as the Ninth Circuit implicitly recognized, the ADA does not provide for a specific list of exempt or categorical disabilities. But neither does it demand that plaintiffs pass through insurmountable hurdles of proof. Rather, the definition should be applied in accordance with its plain meaning and simple common sense. When that is done, it will be obvious that some impairments will always be disabilities.

By their medical nature, some impairments always substantially limit major life activities. A spinal cord injury, a laryngectomy (which requires use of a voice box for speech), loss of a limb, and cerebral palsy, for example, each have an inherently substantial impact on a number of recognized major life activities. In those cases, nothing in the ADA's text requires the individual to provide particularized proof of the nature and extent to which the impairment limits his or her major life activities.

Other impairments may not be universally severe or have universal consequences for each person with the impairment. For example, allergies and asthma are not

substantially limiting for every person with either impairment, although they are for many. In other words, some impairments have a wide range of possible consequences from *de minimis* to life-threatening. The phrases "with respect to an individual" and "of such individual" in the ADA's definition of disability broaden that statute, rather than narrow it. This language permits persons with impairments that are not always substantially limiting to make an individualized showing of disability.

The statute's text and purpose implicitly indicates that some conditions have such predictable consequences that they readily may be treated as disabilities. The ADA's text frequently refers to a "class of individuals with disabilities," suggesting that there are some impairments which are always disabilities, and therefore can be treated as a class. *See, e.g.*, 42 U.S.C. § 12182(b)(2)(A)(i); 42 U.S.C. § 12112(b)(6). Indeed, much of the ADA's text makes sense only if there are categories of disability which can be prospectively identified. For example, the ADA prohibits certain medical examinations to determine whether an individual has a disability.[17] This assumes that it can be known whether one has a disability before an individualized assessment is undertaken. The ADA also contains numerous provisions requiring that buildings and transportation systems be designed and operated in order to be accessible to "individuals with disabilities."[18] These provisions support the

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[17] *See* 42 U.S.C. § 12112(d) (prohibiting covered entity from making inquiry of a job applicant as to "whether such applicant is an individual with a disability or as to the nature or severity of such disability" and limiting such inquiries about "disability" subsequent to a job offer and during employment).

[18] *See, e.g.*, 42 U.S.C. § 12142 (requiring that certain public buses and rail vehicles be "readily accessible to and usable by individuals

conclusion that there are impairments which by their very nature can be identified as disabilities. If not, the very idea of designing a building to be accessible would be nonsensical, as no architect could determine before a building was built whether future patrons would qualify as individuals with disabilities.

Congress intended to provide "consistent, enforceable" standards in order to eliminate discrimination against individuals with disabilities. *See* 42 U.S.C. § 12101(b)(2). Consistent and enforceable standards also are necessary so that employers can prospectively apply the ADA's provisions to increase accessibility or modify programs. For example, the ADA requires that employers make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodations would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). This provision would be inoperable in the workplace if a determination of disability required a fact-intensive, highly particularized assessment of each individual's medical symptoms. Parties would be required to expend significant resources on discovery and development of expert medical testimony in

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with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12143-12165 (specifying compliance requirements in public transportation for "individuals with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12184(3) (prohibiting acquisition after a certain date of vehicles not "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs"); 42 U.S.C. § 12185(mandating that the Office of Technology Assessment shall undertake a study to determine needs of "individuals with disabilities" to use and access buses); 42 U.S.C. § 12204 (mandating that Architectural and Transportation Barriers Compliance Board issue guidelines ensuring that "buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities").

litigation over whether a plaintiff meets the Act's definition of disability, rather than reaching the merits of a particular case. The ADA would become merely an ineffective and expensive litigation tool, rather than a statute designed to open doors of opportunity. Individuals and covered entities alike could never know in advance what conduct is prohibited.

This textual analysis is confirmed by the EEOC's conclusion that some impairments, such as HIV, are inherently substantially limiting. *See* 29 C.F.R. § 1630, App. 1630.2(j) (1997). The ADA's legislative history also reinforces the clear intent of the statutory language that some impairments are always disabilities. *See, e.g.*, H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. at 52 (identifying paraplegia, deafness, lung disease, and HIV as disabilities).[19]

In order to effectuate Congress' intent to create opportunity, courts should apply a common sense approach to determining who is an individual with a disability under the ADA. When an impairment is reasonably understood to be universally limiting, courts should not require highly particularized proof of a person's symptoms and conditions to find coverage under the ADA. Instead, courts should assume that if a reasonable person would find that an individual with

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[19] In the legislative history, Congress was explicit about the provisions of the ADA which required an individualized, case-by-case assessment. For example, Congress stated that the determination of reasonable accommodation is a "fact-specific case-by-case approach" and must be determined on "particular facts." *See* S. Rep. No. 116, 101st Cong., 1st Sess. at 31 (1989). Similarly, Congress was explicit that the determination of "direct threat" "must be made on a case-by-case basis ... [and] requires a fact-specific individualized inquiry..." *Id.* at 27. Although each of the committee reports discusses the definition of "individual with disability" in depth, none discusses the need for a particularized assessment of whether an individual has a "disability."

plaintiff's impairment would be substantially limited in some major life activity, the plaintiff should be protected by the statute. Any other interpretation would illogically shift the focus of determining a valid claim under the ADA from whether an employer's action was inappropriately based on disability, to an exacting analysis of the specific effects of an individual's impairments which bear no relation to the question of whether the discriminatory conduct in question is actionable.

III. THE ADA'S COVERAGE OF INDIVIDUALS REGARDED AS DISABLED REFLECTS CONGRESS' RECOGNITION THAT GROUNDLESS FEARS AND STEREOTYPES CAUSE DISCRIMINATION AGAINST QUALIFIED INDIVIDUALS.

A. An Employer Violates The ADA When It Acts On Inaccurate Assumptions Or Beliefs That An Individual's Mental Or Physical Characteristics Make That Individual Unqualified Or Unsafe To Retain In An Employment Position.

The second and third prongs of the ADA's definition of an individual with a disability extend coverage to those who have a record of having a substantially limiting impairment or who are "regarded as" having such an impairment. 42 U.S.C. § 12102(2). In adopting the Rehabilitation Act's expanded definition of disability, Congress made clear that potentially protected individuals would include those who "may at present have no actual incapacity at all."[20]

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[20] Explaining the 1974 amendment expanding the definition of protected individuals under the Rehabilitation Act, the Senate report

The Senate Committee Report on the 1974 amendments to the Rehabilitation Act explained the basis for expanding the definition to include a third prong covering persons who are "regarded as" having a disability:

> Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause [i] in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 93-1297, at 39. *See also Arline*, 480 U.S. at 279 (Rehabilitation Act's "regarded as" disabled provision was intended to combat the effects of archaic attitudes and

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recognized that individuals "are discriminated against when they are, in fact, handicapped . . . [or] when they are classified or labeled, correctly or incorrectly, as handicapped . . . [or] if they are regarded as handicapped, regardless of whether they are in fact handicapped." S. Rep. No. 93-1297 (1974).

Title I also prohibits discrimination on the basis of an association with a person with a disability. 42 U.S.C. § 12112(b)(4). In ADA claims invoking this provision, the employee is protected despite the individual's lack of any physical or mental impairment.

erroneous perceptions that disadvantage persons with, or regarded as having, disabilities.).[21]

The ADA's use of a three-pronged definition of disability was created to ensure that individuals who have been singled out for discriminatory treatment on the basis of an employer's or covered entity's preconceptions about their physical or mental capabilities be afforded employment opportunities, services and public accommodations previously unavailable to them. An author of the ADA states:

> The recognition that "individuals with disabilities" is a classification created by societal mechanisms that have singled out some people and caused them to be treated differently from others because of real or perceived mental or physical impairments has profound consequences. It explains the overriding importance of the third prong of the definition of disability. If one is regarded as having a substantial impairment by others, then one has a disability. Satisfaction of this prong focuses solely on whether a person has been singled out for different treatment, not upon whatever physical or mental characteristics the person possesses.

Burgdorf, *"Substantially Limited" Protection,* , 42 VILL. L. REV. 409, at 527 ; *see also, e.g., Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (in determining whether an individual is "regarded as" disabled, the court's focus is on the impairment's effect upon the attitudes of others).

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[21] *See also* H.R. Rep. No. 101-485, pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (noting reasoning in *Arline* that the third prong of § 504's definition of disability is designed to protect individuals who have impairments that do not substantially limit their major life functions).

Congress made it clear that, in determining coverage under the ADA's third, "regarded as" prong, the focus of the inquiry appropriately rests on the conduct and motivation of the defendant rather than on the actual extent of the plaintiff's impairment. The Senate Committee Report's examples of individuals protected under the third prong include "people who are rejected for a particular job . . . because of findings of a back abnormality in an x-ray, notwithstanding the absence of any symptoms, or people who are rejected for a particular job solely because they wear hearing aids." S. Rep. No. 101-116, at 24 (1989).[22] In these examples, the back abnormality may be of no practical physical consequence and the hearing aids may improve an individual's ability to hear, but these factors are not dispositive of, or even central to, the inquiry. The Senate Report continues:

> A person who is excluded from any activity covered under this Act or is otherwise discriminated against *because of a covered entity's negative attitudes towards a disability is being treated as having a disability which affects a major life activity.* For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to

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[22] The legislative history also offers as examples of individuals who would be entitled to ADA protection because they are "regarded as" disabled: 1) a disfigured burn victim who is denied work due to the employer's discomfort with the applicant's appearance; and 2) an individual whose pre-employment physical reveals a back abnormality and who is refused employment because of the employer's fears of increased insurance or workers' compensation costs due to injury. *See* H.R. Rep. No. 101-485(III), at 30-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 452, 45-53.

> hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.

Id. (emphasis added). The Senate Report also cites *Thornhill v. Marsh*, a Rehabilitation Act case which held that an employee fired by the Army Corp of Engineers on the basis of its erroneous perception that the employee's congenital spine abnormality "impos[ed] a disqualifying limitation on his ability to lift weight" is an "individual with a handicap" under the "regarded as" prong of the Act. *Id., citing Thornhill v. Marsh*, 866 F.2d 1182, 1183-84 (9th Cir. 1989).

The House Judiciary Committee Report on the ADA echoed this intended coverage under the ADA's "regarded as" prong, noting that "a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition." *See* H.R. Rep. No. 101-485, at 30; Burgdorf, *"Substantially Limited" Protection*, , 42 VILL. L. REV. 409, at 450-51. This form of protection is essential, due to the "common barriers that frequently result in excluding disabled persons. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers." *Id.* None of these barriers necessarily are related to the degree, or actual existence, of a particular individual's impairment.

The inclusion of the "regarded as" definition of disability, and Congress' intention of the role it should play in determining the applicability of the ADA, reflects a common

sense, reality-based understanding of the core nature of disability-based discrimination, and the nature of the public good Congress expected to achieve through this legislation. After all, the ADA was enacted to end the exclusion of individuals with disabilities from employment and services on the basis of stereotypical assumptions that do not reflect their ability to participate and contribute to society. It was never the goal of either Congress or advocates of the ADA to require that employers be required to hire and maintain employees whose impairments actually precluded them from performing a particular job. Rather, the intended beneficiaries of Title I of the ADA are those whose capacity for employment and economic self-sufficiency is thwarted by the assumptions and prejudices of those who are uncomfortable with difference and equate *dis*ability with *lack of* ability.

This reality, and Congress' intent, is reflected in the EEOC's regulations implementing the Act. The regulations provide that an individual is a person with a disability under the "regarded as" prong if 1) the impairment itself does not substantially limit a major life activity but is treated by an employer as having such a limitation; 2) the impairment substantially limits a major life activity only as a result of others' attitudes towards the impairment; or 3) the individual does not have a substantially limiting impairment but is treated by an employer as such. 29 C.F.R. § 1630.2(1). The terms of these regulations are almost identical to earlier regulations adopted under § 504 of the Rehabilitation Act.[23]

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[23] *See* 45 C.F.R. § 84.3(j)(2)(iv) ("Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient [of federal funds] as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none

Even if the Court were to conclude that Kirkingburg's impairment alone does not substantially limit a major life activity, clearly Albertsons treated him as if it does.

B. Albertsons Regarded Kirkingburg As Disabled Because It Fired Him On The Basis Of His Vision Impairment Rather Than On The Basis Of His Skills And Abilities To Perform The Job At Issue.

Albertsons fired Kirkingburg on the basis of its policy of employing only drivers whose vision tests satisfied Department of Transportation ("DOT") regular commercial driver vision requirements. Hallie Kirkingburg has been driving commercial trucks since 1979, has, in the words of the Ninth Circuit, an "impeccable" driving record, and was assessed by Albertsons' transportation manager as possessing "superior driving skill." *Kirkingburg*, 143 F.3d at 1230. As Albertsons recognizes, in order to secure a waiver of the DOT regular vision requirements, Kirkingburg had to be examined by an optometrist or opthamologist who performed certain tests and concluded that he was "able to perform the driving tasks required to operate a commercial motor vehicle." Petitioner's Brief at 9, *citing* Federal Highway Administration ("FHWA"), Qualification of Drivers, 57 Fed. Reg. 31458, 31460 (1992). Nonetheless, Albertsons concluded that Kirkingburg could not satisfy his job requirements solely because of his impairment, and even though the DOT itself has determined that its regular requirements for certification can be waived under certain circumstances without compromising safe driving standards. There can be little doubt that Albertsons regarded Kirkingburg as disabled by basing its employment decision on his vision impairment.

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of the [above defined] impairments . . . but is treated by a recipient as having such an impairment.).

Indeed, Albertsons' insistence that satisfying the DOT's regular vision requirements for certification is an "essential function" of the job, and its rejection of that portion of the DOT regulations adopted to bring DOT into compliance with federal disability antidiscrimination law, underscores the fact that Albertsons regards *anyone* with that level of vision impairment as disabled. There is little practical difference between this job requirement and a job description making full use of both legs an essential function of teaching children in a day care center.

The ADA permits "qualification standards, tests or selection criteria" only when the *employer can show that such criteria are "job-related and consistent with business necessity."* 42 U.S.C. § 12113(a) (emphasis added). It is indisputable that in some professions, an employee's ability to satisfy certain medical criteria is essential for job safety; tuberculosis screening for restaurant and health care workers, the ability to see well enough to pilot a plane or drive a truck safely, clearly are job-related and consistent with business necessity. However, Congress indicated that while the ADA is not intended to override "legitimate medical standards established by federal, state or local law, or by employers for applicants for safety or security sensitive positions," such criteria can stand only "if the medical standards are consistent with [the ADA]." *Id.*

Reliance on physical or mental requirements that are not necessary to ensure that a particular job is performed safely and well -- as is the case here, in which Kirkingburg was examined by an eye specialist and found "able to perform the driving tasks required to operate a commercial motor vehicle" -- constitutes a quintessential example of conduct which satisfies the "regarded as" definition of disability. This is explicitly recognized in the opening provisions of the ADA, which identify "exclusionary qualification standards and

criteria" as a type of discrimination individuals with disabilities routinely encounter. *See* 42 U.S.C. § 12101(a)(5).[24] The fact that performing the actual essential functions of a position may be easier without an impairment does not place incorporation of an impairment-free requirement into a job description beyond judicial scrutiny.[25]

Albertsons' contradictory characterizations of Kirkingburg's vision for the purposes of his job qualifications and for the purposes of coverage as an individual with a disability aptly illustrates the "lose if you can, lose if you can't" interpretation of the Act's definition of disability that has been employed to frustrate legitimate discrimination claims. It conflates the definition of disability with the subsequent determination of whether an individual is qualified to perform a particular job, and attempts to substitute an either-or analysis which recognizes only two categories of individuals — those completely without disabilities and those completely disabled — for the reality in which "'there are spectrums of physical and mental abilities that range from superlative to minimal or nonfunctional.'" *See* Burgdorf,

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[24] "The requirement that job criteria actually measure *ability* required by the job is a critical protection against discrimination based on disability." S. Rep. No. 101-116, at 9-10 (1989). The ability at issue in this case is that of seeing sufficiently well to drive a commercial vehicle safely. Albertsons confuses a *physical characteristic which contributes to* an individual's needed ability to perform a driver's essential functions with the job function itself. As the Ninth Circuit found, standard vision test results are not equivalent to this ability.

[25] The dissent appears to rely on the fact that the portion of the DOT vision regulations on which Albertsons relies have been in effect since 1970 as further evidence of the validity of Albertsons' position. *See Kirkingburg*, 143 F.3d at 1238. This reflects a significant misapprehension of the very purpose of the ADA, which was adopted to dismantle the institutionalization of such physical requirements which have forced qualified individuals off payrolls and on to disability rolls.

"Substantially Limited" Protection., 42 VILL. L. REV. 409, at 519 (footnote omitted) (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983)).

The irrationality of the analysis advanced by Albertsons is well-illustrated by the case of *Everette v. Runyon*, 911 F. Supp. 180 (E.D.N.C. 1995), in which the district court determined that it was "impossible" for a vision-impaired individual to be both substantially limited in the major life activity of working -- one of the ways in which a plaintiff shows eligibility for protection -- and being qualified to work. *Id.* at 183-84. Employing this "lose if you are, lose if you aren't" application of disability definitions under federal law, the court was able to conclude that the plaintiff's vision limitation was too insubstantial to constitute a disability, but so substantial that it rendered him unqualified as an employee. Race discrimination cases have never been resolved through a focus on whether a plaintiff allegedly fired on the basis of race has a clearly documentable blood line showing membership in the protected class. An employer who is motivated by racial animus in terminating a worker does not escape liability under Title VII because it is mistaken about the worker's actual racial heritage.[26]

Indeed, when it amended the Rehabilitation Act in 1974 to include persons regarded as disabled, Congress

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[26] In *Perkins v. Lake County Dept. of Utilities*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994), the court explained that "for purposes of entitlement to relief under Title VII, [it is] unnecessary, and indeed inappropriate, to attempt to measure Plaintiff's percentage of Indian blood or to examine his documentable connection to recognized existing tribes. Employers do not discriminate on the basis of such factors. Objective appearance and employer perception are the basis for discrimination and . . . the key factors relevant to enforcing rights granted members of a protected class."

analogized to Title VII's employment protections for persons mistakenly thought to be members of a racial minority. *See* S. Rep. No. 93-1297, at 38-39 (1974). Yet the ADA, created to prohibit conduct which classifies, segregates and excludes individuals with disabilities, has been applied in a manner in which the focus in determining whether a case can go forward typically has been on the particular nature and extent of the limitations of the plaintiff. The ironic unfairness of this approach is manifest:

> For discrimination based on disability, the focus on the limitations and capabilities of plaintiffs is particularly unfortunate. . . . [A] major form of disability discrimination is differentiating, classifying and labeling people as disabled. Proving that one is disabled is the direct antithesis of the goals underlying the nondiscrimination mandates of the ADA. . . . Having to turn around and prove that, despite having a disability, one is not so disabled that one cannot do the job that one has been performing or has applied for simply adds insult to injury.

Burgdorf, "*Substantially Limited" Protection*, , 42 VILL. L. REV. 409, at 561. The "otherwise qualified" language of the ADA was not included to limit or qualify the expansive definition of disability set forth in the Act's three-pronged definition, but to make it clear that employers have no obligation to hire or retain employees who cannot perform the essential functions of the job in question.

Albertsons has characterized Kirkingburg as too sight-impaired for purposes of employment, yet not sufficiently impaired for protection from discriminatory assumptions based on his vision impairment. The fact that this simplistic, and self-serving, form of characterization reflects anachronistic policies on the treatment of individuals with

sight impairments and other disabilities is no basis for its post-ADA continued tolerance by the courts.[27]

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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[27] For example, despite the statutory language, legislative history, and clear guidance of the EEOC regulations, a number of courts have insisted that plaintiffs claiming protection under the "regarded as" prong also document a substantial limitation of a major life activity in order to sustain a claim under the ADA. *See, e.g., Wooten*, 58 F.3d at 385 (plaintiff was not "regarded as" disabled because he suffered from an impairment which did not limit any of his major life activities); *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1419 (10th Cir. 1992) (plaintiff without substantial limitation of major life activity could not maintain claim that he was "regarded as" disabled).

APPENDIX

AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-two million members are employed. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has, since 1985, filed more than 180 *amicus curiae* briefs before this Court and the Federal appellate and district courts.

AIDS Policy Center for Children, Youth & Families is a national nonprofit organization founded in 1994 to help respond to the unique concerns of children, youth, women, and families living with, affected by, or at risk for HIV/AIDS. AIDS Policy Center conducts policy research, education, and advocacy on a broad range of HIV/AIDS prevention, care, and research issues. Its membership includes individuals and organizations throughout the United States.

The Alliance for Rehabilitation Counseling is an affiliative organization of the National Rehabilitation Counseling Association and the American Rehabilitation Counseling Association. The Alliances's almost 5,000 members are professional rehabilitation counselors, many of whom work directly as rehabilitation counselors and others of whom are rehabilitation educators, rehabilitation administrators and students pursuing a masters degree in rehabilitation counseling. The Alliance is dedicated to the pursuit of the self-fulfillment of all persons with disabilities. The purpose of the Alliance is to advance and improve the profession of Rehabilitation Counseling in its core mission of service to persons with disabilities.

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professional and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

The American Medical Student Association ("AMSA") is an independent student-run organization of nearly 30,000 physicians-in-training members from 143 allopathic and 17 osteopathic medical schools across the country. Founded in 1950, AMSA is committed to improving health care and health care delivery to all people, promoting active improvement in medical education, involving its members in the social, moral and ethical obligations of the profession of medicine, assisting in the improvements and understanding of world health problems, contributing to the welfare of medical students, interns, residents and post MD/DO trainees, and advancing the profession of medicine. AMSA believes the burden of proof of judgment, reliability, capability, or entitlement to a position for individuals with a disability should not be greater than or different from that placed on other persons.

The Arc of the United States ("The Arc"), through its more than 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act.

The Brain Injury Association, Inc. ("BIA") is the only national non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education and prevention of brain injuries. BIA has 42 state associations and serves persons with brain injury, their families and care givers in all 50 states and territories. BIA represents and advocates with and on behalf of the estimated 2.5 to 6.5 million persons with moderate to severe brain injuries in the United States. Many persons with brain injury are recipients of Social Security Disability Insurance ("SSDI") and/or Supplemental Security Income ("SSI"). As a result of changes in rehabilitation programs, an increasing number of persons with brain injury are gainfully employed. Part of BIA's mission is to assure that all persons with brain injury are afforded the protections of the Americans with Disabilities Act. The disposition of this case will affect the ability of persons with brain injury to have access to and security in employment without losing their entitlement to SSDI and/or SSI.

The Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than 30 research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. The Center's Metro DC Collaborative for Women with HIV/AIDS Project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Committee For Children is a national advocacy group with an interest in all aspects of child protection, health, education, and fighting the exploitation of children.

Disabled in Action of Metropolitan New York ("DIA"), a civil rights organization founded in 1970 by Judith Heumann, is committed to ending discrimination against people with disabilities — all disabilities. Over the years, DIA has participated in rallies and demonstrations, as well as initiated and joined lawsuits dealing with such issues as access to wheelchair accessible buses and polling sites, personal assistance services, and appropriate health care for all people. As a grassroots group, many DIA members attempted to obtain jobs but now rely on SSI and SSDI for their necessary living expenses because they ran into considerable and frustrating discrimination when they pursued employment.

The Employment Law Center ("ELC") is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has and is representing clients faced with discrimination on the basis of their disabilities, including clients with claims brought under Title II of the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation of America (also known as the Epilepsy Foundation) is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its

affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures, promotes public understanding of the disorder, and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes stereotyped images and fears which affect persons with this medical condition in all aspects of life, including, and especially, employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws which protect individuals from discrimination based on these stereotypes and fears.

Gay and Lesbian Advocates and Defenders ("GLAD") is a nonprofit public interest law firm, headquartered in Boston, Massachusetts and serving the six New England states. GLAD's mission is to protect and enhance the rights of lesbians, gay men, bisexuals and people living with HIV through litigation, education and advocacy.

Justice For All ("JFA") is a not-for-profit entity created in 1994. JFA serves as an advocate for the disability community and is dedicated to protecting, implementing, and strengthening the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and all existing programs and policies that empower people with disabilities. The JFA works in cooperation with other organizations to facilitate the coordination of advocacy and the exchange of information among all national, state and local disability groups.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda

is the oldest and largest legal organization addressing these concerns. In 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities, including, in part, *Bragdon v. Abbott,* 118 S. Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Company*, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau County. v. Arline*, 480 U.S. 273 (1987); *Chalk v. U.S. District Court*, 814 F.2d 701 (9th Cir. 1988); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991); and *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (1996). Lambda is particularly familiar with the unique barriers confronting persons with HIV, AIDS and other disabilities who attempt to secure equal employment opportunities.

The Legal Action Center is a nonprofit law and policy organization specializing in AIDS, alcohol, and drug issues. The Center's attorneys, who helped draft the ADA protections, represent individuals with alcoholism, drug dependence, and HIV disease and the programs that serve them to resolve discriminatory practices in employment, health care, housing, and zoning.

The National Association of People with AIDS ("NAPWA"), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq*., the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq*., and the Protection and Advocacy for

Individual Rights Program, 29 U.S.C. § 794e, to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1997 alone, P&As served well over 700,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of government.

New York Lawyers for the Public Interest, Inc., ("NYLPI") is a non-profit public interest law office founded in 1977 which practices disability, health and environmental justice law. Under contracts with the New York State Commission on Quality of Care for the Mentally Disabled, it operates four federally-authorized Protection and Advocacy programs in New York City, and serves people with all types of disabilities in a wide variety of issues. *See* 29 U.S.C. §732; 42 U.S.C. §§6041 *et seq.*; 42 U.S.C. §§10801 *et seq*; and 29 U.S.C. §794e. NYLPI handles a broad array of matters involving the Americans with Disabilities Act and similar laws.

Self Help for Hard of Hearing People, Inc. ("SHHH") is a national membership organization of hard of hearing people of all ages, their families, friends, and interested professionals. With a national headquarters, eight state associations and 250 chapters and groups nationwide, SHHH is dedicated to addressing the needs and interests of people who wish to use their residual hearing. The constituency, an estimated 26 million hard of hearing people in the U.S., use hearing aids, assistive technology, and communication strategies to continue functioning in all aspects of daily living. Founded in 1979, SHHH's mission is to make mainstream society more accessible to people who are hard of

hearing through education, advocacy, and self help. Part of that mission is to assure that all people who are hard of hearing are afforded the protections of the Americans with Disabilities Act.

The Title II Community AIDS National Network, Inc. ("T-II CANN") is incorporated as a not-for-profit corporation and represents the interests of service providers and their clients who receive services funded under Title II of the Ryan White CARE Act. T-II CANN provides technical assistance, information, communications, publications and advocacy training in issues ranging from the AIDS Drug Assistance Program, Medicaid, Medicare, AIDS-related health insurance, and benefits. T-II CANN supports finding a cure for HIV/AIDS and ensuring that access to that cure is available for all people living with HIV/AIDS. Until a cure is discovered, T-II CANN will advocate for effective treatments for HIV/AIDS and universal access to those treatments for all people living with HIV/AIDS.

The Union of American Hebrew Congregations ("UAHC") is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. For over a century, the UAHC has fought passionately for religious liberty and tolerance for all Americans, believing these to be among the greatest gifts America has bestowed upon its citizens of the world. The UAHC played an active role in securing the passage of the ADA.